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No. 637

In the Supreme Court of the United States

OCTOBER TERM, 1970

PARLEY PROBST,

Petitioner,

vs.

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, and ORANNA B. MOOSMAN, Administratrix of the Estate of Elizabeth C. Bumgarner Poowegup, Deceased,

Respondents.

PETITION FOR WRIT OF CERTIORARI ON BEHALF OF PARLEY PROBST TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI ON BEHALF OF PARLEY PROBST TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue on behalf of Parley Probst to review the opinion of the United States Court of Appeals for the Tenth Circuit filed in the above-entitled case on the 20th day of April, 1970.

OPINIONS BELOW

The decision of the Federal District Court of Utah, Central Division, was filed on January 7, 1969. Said decision is appended hereto as Appendix I.

The decision of the Tenth Circuit Court of Appeals was filed on April 20, 1970. Said decision is appended hereto as Appendix III.

The decision of the Tenth Circuit Court of Appeals denying timely petitions of Probst and of the Estate for rehearing was filed on June 5, 1970. Said decision is appended hereto as Appendix IV.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Tenth Circuit has committed reversible error by holding that 25 U.S.C. 677n was applicable to the Probst transaction and conferred a statutory right of first refusal on the Ute Indian Tribe.

2. Whether the United States Court of Appeals for the Tenth Circuit has committed reversible error by holding that the bidding provisions of 25 U.S.C. 677n did not terminate on August 27, 1964.

3. Whether the United States Court of Appeals for the Tenth Circuit has created an intolerable confusion within its own circuit by deciding in the *Reyos* case that the termination date of August 27, 1964 was statutory and absolute and by deciding in the *Probst* case that it was not. See Appendix No. XIII.

4. Whether the United States Court of Appeals for the Tenth Circuit has committed reversible error by refusing to hold that when the Tribe allowed the termination date of August 27, 1964 to pass without requesting that the Strawberry land be posted and then waiting more than three years before filing this action, it intentionally relinquished and waived any right it may have had to meet the Probst offer on the Strawberry land.

5. Whether the United States Court of Appeals for the Tenth Circuit has committed reversible error by failing and refusing to apply the Utah Statute of Limitations where the Tribe had alternative remedies at law and in equity for its claim of fraud; and where the Utah Statute of Limitations had run; and whether said Court has thereby brought about a conflict between circuits and also between the Tenth Circuit and the United States Supreme Court which should be resolved by the United States Supreme Court.

6. Whether the United States Court of Appeals for the Tenth Circuit has committed reversible error by failing and refusing to hold that laches defeated Plaintiff's claim, and whether said Court has thereby brought about a conflict between circuits which should be resolved by the United States Supreme Court.

7. Whether the United States Court of Appeals for the Tenth Circuit Court has committed reversible error by shifting the burden of proof from the shoulders of the Tribe to the shoulders of Probst in determination of whether Probst would be prejudiced by having his land taken away from him after nine years, and

whether said Court has thereby brought about a conflict between circuits which should be resolved by the United States Supreme Court.

8. Whether the United States Court of Appeals for the Tenth Circuit has committed reversible error by depriving Probst of his property without due process of law, contrary to the Fifth Amendment to the United States Constitution.

9. Whether the United States Court of Appeals for the Tenth Circuit, by holding that after all these years the Tribe can acquire the Strawberry land by simply paying the $35,000.00, has fashioned a remedy that would discriminate against the Affiliated Utes Corporation and against over 1800 individual members of the Tribe, all of whom have rights equal to the Tribe, and whether said fashioned remedy would open the door for a multitude of inappropriate litigation.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Statutes of the United States here involved are 25 U.S.C. Sections 677, 677(a), 677(aa), 677(L)(5) and 677(n), which are appended hereto as Appendix XI, and Regulations set forth in Title 25 of the Code of Federal Regulations, Sections 121.12, 121.61, 243.2, 243.3, 243.4, 243.5, 243.6, 243.7, 243.11 and 243.12, which are appended hereto as Appendix XII. The United States Constitutional provision applicable to Point IX of our Petition is the Fifth Amendment.

STATEMENT OF THE CASE

Note. An Appendix is submitted herewith under separate cover. It contains the decisions and Findings of Fact and Conclusions of Law of the lower Courts, as well as material documentary evidence and material statutes and regulations. Also included is a list of material dates.

PRELIMINARY STATEMENT

On the 27th day of August, 1954, Congress passed into law the Ute Termination Act (25 U.S.C. Sections 677 et seq.). Section 677(n) of said Act provided that any member of the mixed-blood group could dispose of his interest in tribal assets during the next ten years but "shall first offer it to the members of the Tribe." Said section of the Act further provided that Federal supervision over mixed-blood land, including the offering requirement, was to terminate on August 27, 1964.

Elizabeth, a mixed-blood member of the Tribe, was the successful bidder on certain Indian land known as the Strawberry land pursuant to a different section of the Act than the one which contained the offering provision. She acquired the land by an outright purchase pursuant to the provisions of Section 677(L)(5). She paid for the land with money received from Probst pursuant to a written agreement dated October 28, 1959. She died on the 27th day of November 1963. Her daughter, Oranna, was appointed Administratrix of her estate and thereafter discharged the Probst obligation by conveying the land to Probst by a Court-approved Administratrix Deed dated the 21st day of

September 1964. The land had not been posted for bidding.

On the 20th day of September, 1967, the Ute Tribe filed an action in the United States District Court of Utah against Probst and Oranna as Administratrix, alleging that the contractual relationship between Probst and Elizabeth was fraudulent and that the Tribe should be allowed to purchase the land. Thereafter Oranna filed an Answer and also cross-complained against Probst alleging that he had perpetrated a fraud on Elizabeth and Oranna. Probst filed an answer denying the allegations of the Complaint and Cross-complaint and alleging that the Administratrix' Deed was valid.

The case was tried without a jury and on the 7th day of January, 1969, the Court entered an Order divesting Probst of title to the land, holding that the Tribe had no interest in the land, and that title should be delivered to Elizabeth's estate upon repayment of the $35,000.00 to Probst. Probst filed a Notice of Appeal on the 31st day of January, 1969. The Tribe also filed a Notice of Appeal. Thereafter, the case was argued before the United States Court of Appeals for the Tenth Circuit. Said Court filed its opinion on April 20, 1970, reversing the Trial Court and holding that, by virtue of 25 U.S.C. 677(n) and 25 C.F.R. 243.4, the Tribe had acquired a statutory right of first refusal and that upon payment of $35,000.00 to Probst, the Tribe could acquire the Strawberry land.

The Facts

Probst is a life-long resident of Heber, Utah. His business is that of ranching. On the 27th day of October, 1959, at about 9:00 o'clock P.M., someone knocked on the door of his ranch house. He went to the door and "two Indians were standing there" (R. Vol. 1, pg. 89). One of the Indians was Elizabeth and the other was her husband. They asked Probst if he would be interested in purchasing some Indian land (R. Vol. 1, pg. 99). The next morning Probst sought the advice of his attorney, Glen Hatch. Thereafter he and Elizabeth signed an agreement, dated October 28, 1959, at the office of Elizabeth's attorney, Earl Dillman (See Appendix No. V). The agreement was prepared by Dillman and the signatures of the parties were notarized by Dillman (Pltf. Ex. 1). The agreement provided that Probst pay $35,000.00 to Elizabeth, and that Elizabeth use part of the said sum to pay the purchase price of $26,016.00, which she owed on said land as a result of her successful bid. The agreement further provided that as soon as the anticipated regulations were issued by the Secretary of Interior, Elizabeth was to make an offering of the land to the members of the Tribe. In the event nobody bid on the land, she was to convey same to Probst. A mortgage in the amount of $35,000.00 was executed by Elizabeth in favor of Probst as security. Dillman notarized the mortgage (see Appendix No. VII).

After the agreement had been executed, Probst delivered a check in the amount of $26,016.00 to the realty office at the Indian Agency. In addition, he delivered a check in the amount of $7,500.00 to Elizabeth and one in the amount of $1,484.00 to Dillman

to be held in escrow until Elizabeth had made the anticipated offering to the members of the Tribe.

The rules and regulations providing for bidding procedures were issued by the Secretary of Interior on August 11, 1960 (see 25 C.F.R. 243, et seq.). Elizabeth received her patent on September 20, 1960.

Sometime later, Elizabeth and Probst decided to modify the agreement by delaying the anticipated offering on the land. Accordingly, Hatch prepared a second agreement and sent it to Elizabeth at Fort Duchesne, Utah. The agreement is dated November 11, 1960. Elizabeth signed the agreement in Dillman's office. He notarized her signature (see Appendix VI).

Following execution of the second agreement, Dillman delivered the $1,484.00 check to Elizabeth.

Elizabeth's patent was recorded on November 14, 1960 (see Appendix IX). One of the provisions in the patent was as follows:

> "*Prior to August* 27, 1964, the grantee hereunder shall not dispose of any interest in the property herein conveyed without first offering it to the members of the full-blooded and mixed blood groups of the Ute Indian Tribe . . ."

Nothing happened in connection with the land for over three years. The Bumgarners obtained a divorce on December 21, 1961. Sometime later Elizabeth married a man by the man of Poowegup. She was killed in an automobile acident on the 27th day of November 1963. Oranna was appointed as her Administratrix on the 30th day of January 1964.

Hatch filed a Creditor's Claim on behalf of Probst.

on the 24th day of March 1964 (see Appendix VIII). Attached thereto was a copy of the first agreement and a copy of the mortgage. The Creditor's Claim recited that the Adminstratrix had as a first alternative the offering of the land in accordance with the agreement and as a second alternative, in the event said offering was not made prior to August 27, 1964, the conveying of the land to Probst. The claim recited that in the event the Administratrix refused to follow either of the first two alternatives, Probst would demand foreclosure of the mortgage and damages for breach of contract.

Oranna and her attorney did not post the land. Instead they let the termination date of August 27, 1964 pass and then deeded the land to Probst. Oranna delivered the deed to Probst on the 21st day of September 1964. It was recorded on the 5th day of October 1964.

It is significant that the Tribe had full knowledge of the Probst-Bumgarner agreement from the time of the first agreement to the time of the Complaint as demonstrated by the following evidence:

Minutes of the Tribal Business Committee Meeting Held on November 18, 1959.

A Special Meeting of the Ute Tribal Business Committee was held on November 18, 1959. Present at said meeting was Rex Curry, Executive-Secretary of the Tribe and brother of Elizabeth. The following notation appears in the minutes:

> "Thomas Appah came into the meeting and talked some of the Avintiquin sale also Liz purchased parts in in the Strawberry Valley and in turn reselling to individuals. Tommy was interested in this particular tract of land and was quite perturbed about it." (Def. Ex. F)

Based on said minute entry, the Trial Court made the following Finding of Fact:

> "27. As early as November 18, 1959, plaintiff, the Ute Indian Tribe of the Uintah and Ouray Reservation, had knowledge of the October 28, 1959 executory sale of and between Elizabeth C. Bumgarner as Seller and Parley Probst as Buyer, said knowledge being evidenced by the minutes of the meeting of said tribe on November 18, 1959. . . ."

The Tribe, nevertheless, waited seven years and ten months before taking any action to enforce its so-called right of first refusal on Elizabeth's land.

The Boyden-Hatch Telephone Conversation

Boyden was a member of the Ute Tribal Business Committee and legal counsel for the Tribe. He was closely associated with Curry. They talked with each other "practically every day." (R. Vol. III, p. 225).

Hatch made a telephone call to Boyden on July 15, 1960. He informed Boyden that Probst had an interest in the Bumgarner land and asked for advice as to when the regulations with regard to posting and bidding would be issued by the Department of Interior. Boyden responded with the query, "That's that

isolated tract, isn't it?" (R.Vol. I, p. 96). Said conversation is additional proof that for at least seven years and two months before this action was filed, the Tribe had known that Probst was purchasing the Strawberry land from Elizabeth, that Glen Hatch was attorney for Probst, that posting and bidding prior to August 27, 1964 would be necessary in order to complete the sale, and that there had been no posting and bidding on the land. See footnote No. 1.

The Curry-Probst-Hatch Meeting of the Latter Part of 1963 or the First Part of 1964

Curry was Resource Director for the Ute Tribe. It was his responsibility to represent the Tribe's interest in connection with sales of Indian land (R.Vol. I; pg. 32).

In the latter part of 1963 or the first part of 1964, Probst and Hatch made a trip to see Curry at his office at Fort Duchesne. Curry testified:

> "A. 1963. Mr. Probst and Mr. Hatch came to our office — came to my office *and indicated they had advanced some funds to her for the purchase of the lands*. I think it was — the latter part of 1963 or possible the first part of 1964. In any event, it was after Elizabeth had died." (Elizabeth died November 27, 1963.)

---

[1] Could it be that when Boyden made the "isolated tract" comment he was indicating a realization that said land had been acquired by Elizabeth pursuant to Sec. 677(L)(5), was not a "distributive share," and that consequently the Tribe had no interest in the land? Could this account for the long standing tribal indifference to the Strawberry land? See Point I of this Petition.

and again:

> Q. What was that conversation?
>
> *A. They advised me that they had an interest in the land, and I told them that she couldn't sell the land unless it had been offered to the Tribe first, until after August of* 1964. . . .

Once again the Tribe had been forcefully reminded that Probst was purchasing the Strawberry land and that no posting or bidding had taken place. As Resource Director, Curry supervised the sales of Indian lands. He knew all about bidding regulations on Indian land and was well aware of the significance of the date of August 27, 1964. *Yet he allowed said date to come and go without taking any measures whatsoever to protect the right of the Tribe to bid on Elizabeth's land; and even after the bidding right had expired, he waited for over three years before he and Boyden finally filed the complaint in this case.*

The Recorded Mortgage

The mortgage securing the Bumgarner-Probst agreement was recorded on October 29, 1959. It reads in part as follows:

> "This mortgage is given to secure the following obligations: A contract between the parties of even date herewith, and performance of the terms thereof which require, among other things, re-payment of Thirty Five Thousand Dollars, in the event of a failure of mortgagor to perform the provisions thereof." (Def. Ex. A)

The Tribe is charged with knowledge of the content of the mortgage. See *United States v. Christopher*, 71 F.2d 764 (10th Cir. 1934).

The Bureau of Indian Affairs Records

Following execution of the first agreement, Probst and his attorney delivered to the Realty Office of the Bureau of Indian Affairs a check made out by Probst, payable to the order of the Bureau of Indian Affairs, and dated October 28, 1959. On its face the check stated, "for special account on land purchase" (see Ex. J). The records in the Realty Office were public records (R. Vol. I, pgs. 23, 24). Curry knew that he could obtain the facts concerning any real estate transaction involving a Tribal member by simply consulting the Realty Office (R.Vol. I, pgs. 36, 37). The Probst transaction had been on record at the Realty Office for seven years and 11 months prior to the filing of the Complaint.

Taxes on the Strawberry Land

The records of the Wasatch County Treasurer show that Probst paid the taxes on the Strawberry land in 1961, 1962, 1963, 1964, 1965 and 1966 (See Def. Ex. G).

In addition, Probst has been in possession of the land since October 28, 1959. He made improvements on the land in 1961 (R.Vol. I, pg. 103).

There is no question about the fact that Curry deliberately chose to allow the termination date of August 27, 1964 to come and go without taking any steps to require an offering to the members of the Tribe.

Note. We assure this Honorable Court that no evidence was presented at the trial of this case which either established or tended to establish any

fraud or misrepresentation of any kind on the part of Probst or Elizabeth. Without exception the parties to all transactions were represented by their respective counsel in fair arms-length transactions. The issues raised between Probst and Oranna as Administratrix on appeal to the Circuit Court were never resolved by that Court in view of its holding that the Ute Indian Tribe had acquired a statutory right of first refusal on the Strawberry land. If that issue was improperly resolved, as we are confident that it was, then we respectfully suggest that the case should be returned to the Circuit Court for resolution of the issues between Probst and Oranna, the outcome of which should determine who will receive the Strawberry land.

ARGUMENT

Note. The points we raise herein are set forth in logical sequence and are not necessarily in order of importance. We believe each and every point has substantial merit and constitutes ground for granting our Petition, either standing alone or in combination.

POINT I. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS COMMITTED REVERSIBLE ERROR BY HOLDING THAT 25 U.S.C. 677n WAS APPLICABLE TO THE PROBST TRANSACTION AND CONFERRED A STATUTORY RIGHT OF FIRST REFUSAL ON THE UTE TRIBE.

POINT II. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS COMMITTED REVERSIBLE ERROR BY HOLDING THAT THE BIDDING PROVI-

SIONS OF 25 U.S.C. 677n DID NOT TERMINATE ON AUGUST 27, 1964.

POINT III. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS CREATED AN INTOLERABLE CONFUSION WITHIN ITS OWN CIRCUIT BY DECIDING IN THE *REYOS CASE* THAT THE TERMINATION DATE OF AUGUST 27, 1964 WAS STATUTORY AND ABSOLUTE AND BY DECIDING IN THE *PROBST CASE* THAT IT WAS NOT.

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POINT V. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS COMMITTED REVERSIBLE ERROR BY REFUSING TO APPLY THE UTAH STATUTE OF LIMITATIONS WHERE THE TRIBE HAD ALTERNATIVE REMEDIES AT LAW AND IN EQUITY FOR ITS CLAIM OF

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POINT IX. THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS FASHIONED AN INEQUITABLE AND DISCRIMINATORY REMEDY THAT WOULD OPEN THE DOOR FOR A MULTITUDE OF INAPPROPRIATE LITIGATION

BY HOLDING THAT THE UTE TRIBE IS ENTITLED TO RECEIVE THE STRAWBERRY LAND UPON PAYMENT OF $35,000.00.

POINT I.

THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS COMMITTED REVERSIBLE ERROR BY HOLDING THAT 25 U.S.C. 677n WAS APPLICABLE TO THE PROBST TRANSACTION AND CONFERRED A STATUTORY RIGHT OF FIRST REFUSAL ON THE UTE TRIBE.

The Circuit Court made the following statement in its opinion:

> "The construction and application of Sec. 677n is decisive. The land was a tribal asset."

Said statement is erroneous in two particulars. First, the land was not a tribal asset at the time of the Probst transaction, and, second, Sec. 677n is not decisive. It is not even applicable. We respectfully request this Honorable Court to consider the background and circumstances of the Strawberry purchase in the light of the position we take on this important point.

Background

The Plan of Distribution approved and adopted by the full-blood and mixed-blood members of the Ute Tribe pursuant to the Termination Act provided for division of the tribal land, with the mixed-bloods receiving twenty-seven percent and the full-bloods sev-

enty-three percent. During the ten year period between August 27, 1954 and August 27, 1964, the plan was for the mixed-bloods to progress steadily to the point of full citizenship and unrestricted ownership of their respective shares of the tribal assets. The Affiliated Utes, a body corporate, was the designated representative authorized to handle mixed-blood real property during the aforementioned transitional period. The more desirable real property belonging to the mixed-bloods was to be parcelled out by the Affiliated Utes to the members as their "distributive shares." No consideration was to be paid by the members on their "distributive shares" and said real property was, therefore, considered to continue as part of the tribal assets. Such "distributive shares," being part of the tribal assets, could only be disposed of during the ten-year period by compliance with Sec. 677n of the Act.

On the other hand, some of the more undesirable marginal real property was to be made the subject of outright sales by the Affiliated Utes to both members and non-members of the Tribe pursuant to Sec. 677(L)(5) of the Act. *Under said section, the purchaser, whether he was a member or a non-member, was under no statutory obligation whatsoever to make any offering to the members of the Tribe prior to a resale of the property.* Said section authorized delivery of an unencumbered title to the purchaser. The stated Congressional purpose in authorizing such outright sales was to allow the mixed-bloods to dispose of land "when, in the opinion of the majority of said mixed-blood group, a practical partition cannot be made." It was thought that the best interest of the membership would be better served by sell-

ing such real property "and the proceeds of such sales shall be distributed equitably among the members of said mixed-blood group." Thus, the very purpose of Sec. 677 (L) (5) was to allow greater flexibility in disposal of land which the majority of the mixed-blood membership did not desire to have distributed to them as part of their respective "distributive shares" *and the exclusion of the bidding requirement from said section appears clearly to have been a deliberate exclusion to effectuate said purpose.*

The Strawberry land, being an "isolated tract" far removed from other tribal land, was particularly well suited for outright sale rather than partitioning as part of the tribal assets.

THE STRAWBERRY PURCHASE

In September of 1959, the Affiliated Utes decided to sell the Strawberry land as a result of a determination made by a majority of the membership that said land was undesirable for partitioning. Elizabeth became the purchaser at a cash sale made pursuant to Sec. 677 (L) (5). *By virtue of said sale the Strawberry land ceased to be a part of the tribal assets. The purchase price of $26,016.00 had, instead, become the tribal asset.* Therefore, when Elizabeth entered the Probst agreement, she was offering for sale a piece of real property that belonged solely to her and in which the members of the Tribe no longer had an interest. *Yet only if the land were a tribal asset at the time of the Probst transaction would Sec. 677n be applicable.* The language of Sec. 677n is explicit on this matter where it sets forth the subject of the section as follows:

"Any member of the mixed-blood group may dispose of his interest *in the tribal assets*. . . .

and then goes on to discuss the *manner* in which such disposal of assets may take place.

In view of the fact that the Strawberry land was not a tribal asset at the time of the Probst transaction, it follows that Sec. 677n was not applicable, and, of course, it also follows that no statutory right of first refusal belonging to the Tribe ever came into existence. Inasmuch as the Tribe had no statutory right of first refusal, we are back to the conclusion that the Trial Court was correct when it decided that the Tribe had "no interest" in the Strawberry land.

It is true that the Secretary placed a ten-year bidding restriction in Elizabeth's patent which was issued many months after the Probst agreement. His purpose in doing so was never revealed at the trial. But this much is clear. There is no way the Tribe could acquire an enforcible right of first refusal by virtue of said restrictive covenant, for the reason that the covenant was not authorized by the governing statute under which Elizabeth had made her purchase. The right to sell marginal land *without* submitting it to a bid, granted under Sec. 677(L)(5) to the Affiliated Utes upon a vote of the majority of its membership, would be a legal nullity if the Secretary could negate that right by simply placing a restrictive covenant in the patent. The recent case of *Tooahnippah v. Hickel*, reversing the Tenth Circuit Court of Appeals, at 397 U.S. 598, 25 L.Ed.2d 600, 90 S.Ct. 1316 (1970), supports our position where Mr. Chief Justice Burger states:

> "We need not here undertake to spell out the scope of the Secretary's power, but we cannot assume that Congress, in giving testamentary power to Indians respecting their allotted property with the one hand, was taking that power away with the other by vesting in the Secretary the same degree of authority to disapprove such a disposition."

The language of this Court in *Francis v. Francis*, 203 U.S. 233, 27 S.Ct. 129, 51 L.Ed. 165 (1906), would also appear to be applicable:

> "It follows that the words in the patent of 1827 'but never to be conveyed by them or their heirs without the consent and permission of the President of the United States,' were ineffectual as a restriction upon the power of alienation. The President had no authority, in virtue of his office, to impose any such restriction; certainly not, without the authority of an act of Congress, and no such act was ever passed."

Whether the patent was too broad or too restrictive was strictly a matter between Elizabeth and the Secretary.

In summary, the Tribe acquired no statutory right of first refusal by virtue of Sec. 677n because that section was inapplicable in view of Elizabeth's outright purchase under Sec. 677(L)(5). It acquired no right of first refusal by virtue of the patent because the restrictive covenant in the patent was not authorized by the statute under which the original purchase had been made. It acquired no right of first refusal by virtue of the Probst agreement because that was a private matter between Elizabeth and Probst. And if the Tribe acquired no right of first refusal then, of

course, the Circuit court's decision is based on an untenable premise, and must fall.

The Circuit Court's erroneous decision doesn't just affect the parties to this lawsuit. It affects, in varying degrees, the membership of an entire tribe of Indians. It also affects the titles to numerous tracts of mixed-blood land. We need only point out that if the Circuit Court's decision is allowed to stand, all of the marginal land, sold by the Affiliated Utes pursuant to Sec. 677(L) (5) during the ten-year transitional period, will become subject to the bidding restrictions of Sec. 677n. *What is then to prevent the Tribe from even now acquiring every single parcel of land purchased under the aforesaid circumstances pursuant to Sec. 677 (L) (5) by simply offering to meet the original sale price?* Congress can't possibly have intended to give the Ute Tribe such awesome control over ultimate disposition of mixed-blood land.

The Termination Act, and more particularly, the sections of the Act which are here involved, have never been interpreted by the United States Supreme Court. We submit that there are substantial and compelling reasons why this Honorable Court should grant our Petition.

POINT II.

THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS COMMITTED REVERSIBLE ERROR BY HOLDING THAT THE BIDDING PROVI-

SIONS OF 25 U.S.C. 677n DID NOT TERMINATE ON AUGUST 27, 1964.

As indicated in Point I of our Petition, the Tenth Circuit Court of Appeals has committed reversible error by holding that Sec. 677n of the Ute Termination Act was applicable to the Probst transaction. We take the position that, even assuming said section of the Act to be applicable, the Circuit Court has compounded its error by holding that strings still attached to the Strawberry land in spite of the fact that Oranna did not dispose of said land until after the statutory termination date of August 27, 1964. Said holding is contrary to the stated Congressional purpose of the Act and is contrary to the language of the Act.

In support of its opinion, the Circuit Court makes the following statement:

> "We believe that when a mixed-blood *determines* within the ten-year period to dispose of his acquired interest, the Tribe had the right to have the property offered to it in accordance with the statute and regulations. Elizabeth determined to sell the land at or before the time when she entered into the first contract with Probst. She did not offer the land to the Tribe. Her administratrix in turn did not offer it, but instead waited until the expiration of the ten-year period and then gave Probst a deed. The Tribe was thus deprived of its statutory right."

Thus, the Circuit Court has held that if a mixed-blood landowner "determines to dispose" of his land within the ten-year period, the other members of the Tribe instantly acquire a right of first refusal and no person can thereafter acquire title to such land without

being subject to the possibility that at some future date a member of the Tribe might decide to meet the original sale price.

Furthermore, under the Circuit Court's opinion, once a "determination to dispose" has been made within the ten-year period, the owner has burned his bridges and has no right to change his mind. He has "determined to dispose" of his land, and the right of the members of the Tribe to demand that he make an offering, as well as their right of first refusal on the offering, is absolute. It becomes a covenant running with the land in perpetuity. The termination date of August 27, 1964 has thus been rendered meaningless and the member-owner has lost the right which Congress gave him to dispose of his land after that date *without* being subject to Federal supervision.

We take the position that August 27, 1964 was meant by Congress to be a significant date in the lives of the mixed-bloods—that it was the date on which they were freed of the bondage that had theretofore prevented them from disposing of their land without governmental supervision. The Congressional purpose of the Termination Act conforms with our position, as is evident from a reading of the Act itself where it is stated:

> "The purpose of sections 677-677aa of this title is to provide for the partition and distribution of the assets of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah between the mixed-blood and full-blood members thereof; *for the termination of Federal supervision over the trust, and restricted property of the mixed-blood members of said tribe;* . . ."

A further explanation of the purpose of the Act can be found in House Report No. 2493 where it is stated:

> "*The enactment of the bill will permit the early termination of Federal supervision over approximately one-fourth of the members of the Ute Tribe, who have advanced culturally, socially, and economically to the point where they do not need special Federal supervision and service . . .*"

In said report also appears a letter from Orme Lewis, Assistant Secretary of Interior, wherein the purpose of the Act is stated to be as follows:

> "5. The termination of restrictions on individually owned property of the mixed-blood group."

The language of 25 U.S.C. 677n conforms to the stated purpose of the Act. Said section reads as follows:

> "Any . . . mixed-blood may dispose of his interest . . . prior to termination of federal supervision, subject to the approval of the Secretary. In the event a . . . mixed-blood . . . *determines to dispose of his interest . . . within 10 years from August 27, 1954 . . . he shall first offer* it to the members of the Tribe, and no sale of any interest . . . shall be authorized without such offer . . . in such form as may be approved by the Secretary."

To paraphrase Section 677n, Congress has said that, in the event a mixed-blood "determines to *dispose*" of his interest within the ten-year period, "he shall first offer" to the members of the Tribe. The word "first" simply means that the landowner must offer the land to the members of the Tribe before he disposes of the land, *in the event he disposes of same within the ten-year period.*

We call attention to the regulations adopted by the Secretary sometime later. 25 C.F.R. 243.4 supports our analysis completely. It states:

> "Subsequent to the termination of Federal supervision over the property of a mixed-blood member . . . and *before August* 27, 1964, *any* mixed-blood member *may dispose of his interest* in any real property, as herein defined *after having provided members of the tribe with an an opportunity to meet . . . the highest bona fide offer* received by him."

The section then goes on to set forth language to be placed in "any deed or other instrument of conveyance" as follows:

> "*Prior to August* 27, 1964 *the grantee hereunder shall not dispose of any interest* in the property herein conveyed without first offering it to the members . . ."

Thus, August 27, 1964 is set forth very clearly as the crucial date and the subject of the section is *actual disposal rather than determination to dispose.*

Incidentally, the language that showed up in Elizabeth's patent is the language of 25 C.F.R. 243.4. The patent states:

> "Prior to August 27, 1964, the grantee hereunder shall not dispose of any interest in the property herein conveyed without first offering it to the members . . ." See Appendix IX.

When the statute and regulations are read together, a number of conclusions can be drawn:

1. A member owner has the right to "determine to dispose" of his land and to seek and obtain offers from non-members during the ten year period.

2. Non-members who make such offers are not outlaws simply because they are dealing with mixed-bloods who are on the verge of full citizenship. Nor is there any public policy against such offers.

3. After an offer has been made, the member owner has two basic choices in disposing of his interest in the land:

(a) Before August 27, 1964, if he undertakes to "dispose of his interest" in the land, he must first offer the land to members of the Tribe.

(b) After August 27, 1964, if he undertakes to "dispose of his interest" in the land, he can do so without offering the land to members of the Tribe.

4. *If the mixed-blood owner decides not to dispose of his interest in the land, at any time before actual disposal of said interest, there is absolutely no statutory or regulatory requirement that said owner must offer the land for sale to the members of the Tribe.*

5. After August 27, 1964, all Federal restrictions upon the sale of mixed-blood land of every kind and nature whatsoever are terminated.

One reason why the Tenth Circuit took a position inconsistent with our claim that August 27, 1964 was the date on which Federal supervision over mixed-blood land terminated, was its stated belief that ". . . Congress, by incorporating Sec. 677n into the Act, had in mind primarily the protection of the tribe and only secondarily, if at all, the protection of the selling mixed-blood." We cannot allow this statement to pass uncontested.

First, the distribution of 27% of the tribal lands to the mixed-bloods and of the other 73% to the full-bloods shows that what Congress basically had in mind was the ultimate individual member ownership of all of said lands. In this connection, the Affiliated Utes, representing the mixed-bloods, was authorized to distribute a part of the land to the individual members as part of their "distributive shares" of mixed-blood land, subject only to the bidding restriction contained in Sec. 677n. Such an owner, once having received his distributive share, could mortgage it, lease it, or exercise any other indicia of ownership. In connection with such mortgages, he was specifically authorized to mortgage to non-members, subject only to approval of the Secretary, and such mortgage holders then had the right to foreclose and thus acquire absolute ownership with no intervening right whatsoever on the part of members of the Tribe. See 25 C.F.R. 121.61. In addition, the Affiliated Utes were authorized to make outright sales of their more undesirable marginal land to members *or* non-members under Sec. 677(L)(5) *without* any bidding restrictions whatsoever. The whole concept of land disposal under Sections 677n and 677(L)(5) is inconsistent with the Circuit Court's statement concerning Congressional intent.

Second, if the primary purpose of Congress was to protect the members of the Tribe against alienation of Indian land, all Congress need have done was to incorporate a provision in the Act that no member of the Tribe could *ever* sell his land, however acquired, to a non-member without subjecting it to a bidding proce-

dure authorizing any member to meet the offered price. This was *not* done.

Third, the fact that August 27, 1964 was fixed by Congress as the date on which all Government restrictions on alienation of mixed-blood land terminated, is entirely inconsistent with the Circuit Court's Congressional intent theory. It should be quite obvious that the primary purpose of the bidding restriction of Sec. 677n was to give the mixed-blood owner a better chance of obtaining a fair price for his land during the ten-year transitional period, after which he was expected to have arrived at a degree of responsibility which would enable him to handle his own affairs without further governmental assistance. The bidding privilege accorded to the members of the Tribe was only of secondary importance.

Returning to the case at bar and assuming once again, but not admitting, that Sec. 677n is applicable to the Probst agreement, it becomes apparent that when Elizabeth entered her agreement with Probst she, in fact, had "determined to dispose" of her land. But that determination was contingent on a number of factors and couldn't possibly be carried out in the near future. For instance, she had to obtain her patent. In addition, the rules and regulations of the Secretary pertaining to offerings on mixed-blood land had to be issued. In the meantime Elizabeth changed her mind and decided to delay disposing of her land. Is there anything sinister about such a decision on Elizabeth's part? Of course not! This was her land. She had paid the full purchase price for it. *She had no duty whatsoever to dispose of it prior to August 27, 1964 or at all. If she chose to alter or even abolish her agreement with Probst that was nobody-*

else's business. It most certainly was not the business of the Tribe. Under the terms of Sec. 677n she was entitled to exercise every indicia of ownership just so long as she didn't dispose of her land before August 27, 1964. After that date she and her heirs were freed of the last vestige of governmental control over her land. They could then recognize or repudiate the Probst claim and would be answerable only to him in a Court of competent jurisdiction under ordinary principles of Contract law.

What actually happened was that after August 27, 1964, Oranna and her attorney decided to satisfy the Probst obligation by conveying the land to Probst in accordance with paragraph 2 of the Creditor's Claim. *The land had never been disposed of by Elizabeth or Oranna prior to that time.* The deed was executed for a valid consideration and pursuant to an order of the Court having jurisdiction over Elizabeth's estate. Its execution was the culmination of a series of transactions that violated none of the proscriptions contained in Sec. 677n or in any other section of the Termination Act. Thus, the Tribe acquired no interest in the Strawberry land.

As heretofore pointed out, the Termination Act has never been interpreted by the United States Supreme Court: We believe there are special and compelling reasons for granting our Petition and reviewing the important point raised herein.

POINT III.

THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS CREATED AN INTOLERABLE CONFUSION WITHIN ITS OWN CIRCUIT BY DECIDING IN THE *REYOS CASE* THAT THE TERMINATION DATE OF AUGUST 27, 1964 WAS STATUTORY AND ABSOLUTE AND BY DECIDING IN THE *PROBST CASE* THAT IT WAS NOT. See Appendix XIII.

By coincidence, two different divisions of the Tenth Circuit Court of Appeals simultaneously considered different aspects of the Ute Termination Act and arrived at divergent opinions concerning whether 25 U.S.C. 677n in fact terminated Federal supervision over mixed-blood property on August 27, 1964. In the case of *Reyos, et al. v. United States of America, et al.*, Case Nos. 40-69, 41-69, 42-69, 43-69 and 44-69, twelve mixed-blood members of the Ute Indian Tribe filed a suit as a test case on behalf of eighty-five members of the Tribe against the United States of America and against the First Security Bank of Utah, among others. The claim against the United States, insofar as material here, was that the Federal trust relationship of the Government with mixed-blood members did not actually terminate by virtue of the various provisions of the Termination Act but that a sort of wardship over the affairs of the mixed-bloods continued beyond the various termination dates fixed in the Act. The Trial Court went along with this theory but the Circuit, in a decision dated June 19, 1970, reversed and held that the termination dates, including the date of August 27, 1964, were absolute and

binding because they were so declared by Congress. The decision is long and involves many facets of the relationship of the mixed-bloods with the Government as well as with non-members of the Tribe. We quote a few statements of the Court that we believe are material here:

> "Thus in the event that a stockholder of the Ute Distribution Corporation desired to sell his stock before August 27, 1964, it was necessary that it first be offered for sale at a stated price to the tribe or to the members of the tribe . . .
>
> "This provision can best be referred to as a right of refusal in the members of the tribe or the tribe. *It expired on August* 27, 1964."

By way of explanation, the Ute Distribution Corporation stock mentioned in the ***Reyos case*** was a part of the mixed-blood tribal assets to which each member was entitled to a distributive share and which consequently would fall into the same category as the distributive shares of real property allocated to mixed-blood members. Said stock was subject to exactly the same restrictions on disposal which governed other tribal assets under the provisions of Sec. 677n. The Court went on to say:

> "The statute expressly provides for termination of the Government's relationship with the individual mixed-bloods. The provisions are clear and the termination was accomplished and is final. It is clearly within the power of Congress and no one else to provide for such an end to the relationship between these individuals and the Government. (Citing cases). *It is not for administrative officials or for the courts to modify this statutory termination by the creation of some status lying between wardship and complete termination* . . ."

The Court concluded its remarks with the following holding:

> "The trial court was thus in error in concluding that limited aspects of the federal trust relationship continued, *or that any form of wardship continued*, and thus that some duty on the part of the Government to the plaintiffs continued after termination in connection with their sales of U.D.C. stock. There being no duty the trial court was in error in awarding damages against the United States under the Tort Claims Act.

The basic variance between the decision in the *Reyos case* and the decision in the case at bar is clear. In the *Probst case* the Tenth Circuit Court has stated that under the provisions of Sec. 677n, as soon as a mixed-blood member "determines to dispose" of his land, a right of first refusal comes into existence and that, regardless of when the owner actually *undertakes* to dispose of the land, the said right of first refusal remains attached to the land. The fact that disposal takes place after August 27, 1964 is immaterial. We submit that this is simply another attempted establishment of a "status lying between wardship and complete termination" condemned in the *Reyos case*. In the *Reyos case* the Tenth Circuit Court has said that no "limited aspects of the federal trust relationship continued," that "It is not for administrative officials or for the courts to modify this statutory termination by the creation of some status lying between wardship and complete termination." and also that the right of first refusal in the members of the Tribe "*expired on August 27, 1964.*"

Either the right of first refusal expired on August 27, 1964, or it didn't. The Tenth Circuit has said that it

did in *Regos* and that it didn't in *Probst*. We respectfully submit that this Honorable Court should grant our Petition in order to clarify the conflict within the Tenth Circuit as to the significance of August 27, 1964 as the statutory date on which the right of first refusal ended for the members of the Tribe.

POINT IV.

THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS COMMITTED REVERSIBLE ERROR BY REFUSING TO HOLD THAT WHEN THE TRIBE ALLOWED THE TERMINATION DATE OF AUGUST 27, 1964 TO PASS WITHOUT REQUESTING THAT THE STRAWBERRY LAND BE POSTED AND THEN WAITED MORE THAN THREE YEARS BEFORE FILING THIS ACTION, *IT INTENTIONALLY RELINQUISHED AND WAIVED* ANY RIGHT IT MAY HAVE HAD TO MEET THE PROBST OFFER ON THE STRAWBERRY LAND.

The Circuit Court has held that, pursuant to 25 U.S.C. 677n, the Tribe acquired a statutory right of first refusal at the time Elizabeth "determined to sell her land." Again assuming, but not admitting, that the Tribe did acquire a right of first refusal, most certainly that right is limited and circumscribed by the statute that created it. Said statute terminated the offering requirement as of August 27, 1964.

Since a legal right doesn't carry with it a legal duty

on the part of its possessor to exercise that right, the question here is whether the Tribe was deprived of its so-called right of first refusal on Elizabeth's land or whether it simply relinquished and waived that right. This question can best be answered by considering the knowledge possessed by the Tribe *as Curry and the other members of the Tribal Council stood by and watched August 27, 1964 come and go with no indication whatsoever that they were in the least bit interested in the Strawberry land.*

We have heretofore pointed out the mountainous evidence showing tribal awareness of the 1959 agreement between Probst and Elizabeth. We have called attention to the meeting of the Tribal Council on November 18, 1959, at which Thomas Appah discussed the matter with the Council; the Boyden-Hatch telephone conversation of July 15, 1960; the mortgage which was recorded on October 29, 1959; the Bureau of Indian Affairs records revealing details of the agreement; the taxes paid by Probst on the land over a period of many years; and last, but by no means least, the conversation of Hatch and Probst with Curry at Curry's office in which Curry admitted he had been advised that Probst had advanced money on the purchase of Elizabeth's land.

Let us consider the significance of Curry's testimony concerning this conversation in the light of the Circuit Court's holding that a tribal right of first refusal comes into existence immediately when an owner "determines to sell" his land. Did the fact, as Curry testified, that Probst "had advanced some funds to her for the purchase of the land" indicate to Curry that Eliza-

beth had "determined to sell" her land? It obviously indicated just that to Curry because he then said, "I told them that she couldn't sell the land unless it had been offered to the Tribe first, until after August of 1964." One thing is perfectly clear from this conversation. *Curry believed that a sale could not be made before August 27, 1964 without a posting but that such a sale could be made after August 27, 1964 without a posting.* Thus believing, he deliberately let that important date come and go without demonstrating the slightest interest in the Strawberry land. The only logical conclusion to be drawn from Curry's inaction is that the Tribe simply was not interested in meeting the $35,000.00 purchase price on said land. *Yet only if the Tribe had proven that on or before August 27, 1964 they were able to, and desirous of, paying $35,000.00 for the Strawberry land should they have prevailed in this case.* The Tenth Circuit Court recognizes that such is the case where it makes the following statement:

> "The language of § 677n means that Congress believed it preferable that tribal land acquired by a mixed-blood, who determine to sell before 1964, return to the Tribe *if the Tribe wanted it and could match the offering price.*"

The Circuit Court then proceeds to totally ignore the fact that the Tribe failed in its burden of proof on this subject. Where is there any evidence to sustain a finding that before August 27, 1964 "the Tribe wanted this land? Where is there any evidence that the Tribe could "match the offering price?" The Trial Court recognized this deficiency in the Tribe's evidence in its Conclusion of Law No. 11 (R.Vol.IV, Pg. 22), where the Trial Court states:

> "In the case at bar the plaintiff Tribe suggests injury by being deprived of the opportunity of acquiring the property for $35,000. It is speculative because of the impossibility of reconstructing what would have happened should the property have been posted that the Tribe would have acquired the property at all and certainly it is speculative that it would have acquired it for $35,000."

The fact of the matter is that, as Resource Director of the Tribe, Curry was simply not interested in paying $35,000.00 for the Strawberry land. This isn't hard to understand. All anyone needs to do is look at the map in evidence in this case which shows literally thousands upon thousands of acres of undeveloped range land that had been set apart for the Ute Tribe in the distribution plan. This particular "isolated tract" of marginal land wasn't thought to have any unique or exceptional value, as evidenced by the fact that Elizabeth was the successful bidder and that her bid was less than the appraised value of the land. The Tribe would have had to pay $9,000.00 *more* than the last Government appraisal on this land in order to have purchased it before August 27, 1964. This it had no intention of doing.

In this connection, we cite *Alexander v. Phillips Petroleum Co.*, 130 F.2d 593 (10th Cir. 1942), where the Court stated:

> "Where a plaintiff, with knowledge of the relevant facts, acquiesces for an unreasonable length of time in the assertion of a right adverse to his own, the Court may presume assent to the adverse right, and the consequent waiver of the right sought to be enforced. (Citing cases)

When the Tribe watched August 27, 1964 come and go with full knowledge of the Probst transaction, can it be doubted that the Tribe was acquiescing "for an unreasonable length of time in the assertion of a right adverse to his (its) own, . . . " and consequently assented to the adverse right and waived its right to enforce same?

In August of 1964, the Tribe didn't want the Strawberry land. In September of 1967 things had changed. The Tribe had decided that the value of the land was such that it would be profitable for them to attempt a renewal of their so-called right of first refusal even if it was necessary to accuse innocent people of fraud in order to do it. Their motive was profit. The question is, should the Tribe be allowed to wait over three years after the offering requirement had lapsed to see whether land values would go up or down? We all know that if the value of this land had gone down, the suit would never have been filed.

Consider the language of *Alexander v. Phillips Petroleum Co., supra,* where the Tenth Circuit Court emphasized that:

> "A person may not withhold his claim awaiting the outcome of a doubtful enterprise and, after the enterprise has resulted in financial success favorable to the claimant, assert his interest, especially where he has thus avoided the risks of the enterprise. The injustice of permitting one, holding the right to assert an interest in property of a speculative character, to voluntarily await the event and then decide when the danger is over and the risk has been that of another, to come in and share the profit is obvious. In such circumstances, persons having claims to

property are bound to use the utmost diligence in enforcing them . . . "

The Tribe waited for over three years following expiration of the termination date with full knowledge of the Probst transaction. Most certainly its conduct in this regard cannot be characterized as "utmost diligence" or for that matter as any diligence at all. Under all acceptable principles of equity law, the Tribe must be held to have intentionally relinquished and waived any right it may have had of first refusal on the Strawberry land.

POINT V.

THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS COMMITTED REVERSIBLE ERROR BY REFUSING TO APPLY THE UTAH STATUTE OF LIMITATIONS WHERE THE TRIBE HAD ALTERNATIVE REMEDIES AT LAW AND IN EQUITY FOR ITS CLAIM OF FRAUD AND WHERE THE UTAH STATUTE OF LIMITATIONS HAD RUN.

The Federal rule is that, where a Federal Court has jurisdiction to grant either equitable or legal relief, equity follows the law and the equitable remedy will be withheld if the State Statute of Limitations would bar the concurrent legal remedy.

In the United States Supreme Court, and elsewhere in the Federal system, the aforesaid rule of law has been recognized many times.

In *Helmers v. Anderson*, 156 F.2d 47 (10th Cir. 1946), aff'd. 331 U.S. 461, 67 S.Ct. 1340, 91 L.Ed. 1602 (1947), the Court stated:

> "Although the suit was brought in equity the complaint seeks to enforce a legal right for which equity provides a concurrent remedy to avoid a multiplicity of suits. Bailey v. Tillinghast, 6 Cir. 99 F. 801. In such a case the Federal Court sitting in equity will apply the applicable statute of limitations. Russell v. Todd, 309 U.S. 280, 60 S.Ct. 527, 84 L.Ed. 754."

See also Justice Brennan's concurrence in *McCallister v. Magnolia Petroleum Co.*, 357 U.S. 221, 228, 78 S.Ct. 1201, 1206, 2 L.Ed.2d 1272, 1278 (1958).

In *Cassell v. Taylor*, 243 F.2d 259, (D.C. Cir. 1957), the Court stated:

> "In those instances where the court has concurrent jurisdiction to grant either equitable or legal relief in the enforcement of the asserted obligation, equity follows the law and the equitable remedy will be withheld if the local statute of limitations would bar the concurrent legal remedy. Cope v. Anderson, 1947, 331 U.S. 461, 67 S. Ct. 1340, 91 L.Ed. 1602."

See also *Swan v. Board of Higher Education*, 319 F.2d 56 (2nd Cir. 1963); *Johnson v. Yielding*, 165 F. Supp. 76 (N.D. Ala. 1958); *Shapiro v. Schwamm*, 279 F.Supp. 798 (S.D.N.Y. 1968).

In the case at bar, although the remedy given the Tribe is equitable in nature, potential legal remedies were also available to the Tribe, one of which was money damages for the alleged fraud and connivance

which constituted the basis of the complaint. This being true, under the above cited cases the Tribe's complaint should have been dismissed as untimely filed in view of the overwhelming evidence showing that the Utah three-year Statute of Limitations governing fraud actions had run. Probst had been in possession of the Strawberry land for over seven years, more than three years of which had passed since the termination date, before the Tribe filed its complaint. See Utah Code Annotated 1953, Sec. 78-12-26(3).

The Circuit Court, in denying application of the Utah Statute of Limitations, has misapplied a decision of this Honorable Court, to-wit: *Holmberg v. Armbrecht*, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743 (1946). The Holmberg case states that a Federal Court in an action to enforce a federally created right "For which the sole remedy is in equity" is not bound by a corresponding state Statute of Limitations. That decision, when considered in the light of preceding and subsequent cases, clearly was not intended to apply to a situation where legal *and* equitable remedies were available to a litigant, as in the case at bar.

Our Petition for a Writ should be granted in order to prevent divergent rules of law between circuits and particularly to prevent the Tenth Circuit from developing a rule of law at variance with controlling United States Supreme Court decisions.

POINT VI

THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS COMMITTED REVERSIBLE ERROR BY FAILING AND REFUSING TO HOLD THAT LACHES DEFEATED THE UTE TRIBE'S CLAIM.

Whether the Circuit Court was under a duty to apply the Utah Statute of Limitations or not it should, at the very least, have given the running of the Utah Statute of Limitations and the gross untimeliness of the Tribe's complaint great weight in determining whether laches defeated the Tribe's claim, especially in view of the factors pointed out by us in Point IV of this Petition.

The rule for which we contend is set forth in West's Digest under Courts, key number 375, where it is said:

> "A federal court, sitting in equity, will be guided by state statutes of limitations, though not bound thereby in determining if a suit should be dismissed for laches."

In further support of said rule, see *Russell v. Todd*, 309 U.S. 280, 288, 60 S.Ct. 527, 531, 84 L.Ed. 754 (1940); *Leonick v. Jones and Laughlin Steel Corp.*, 258 F.2d 48 (2nd Cir. 1958); and *Larios v. Victory Carriers, Inc.*, 316 F.2d 63 (2nd Cir. 1963).

The Tenth Circuit earlier set forth its understanding of the rule in the case of *Shell v. Strong*, 151 F.2d 909 (10th Cir. 1945), where the Court stated:

> "A court of equity is not bound by the statute of Limitations, but, in the absence of extraor-

> dinary circumstances, it will usually grant or withhold relief in analogy to the Statute of Limitations relating to actions at law of a like character . . .

The decision of the Tenth Circuit Court, in the case at bar, on the laches question is contrary to its own earlier decision in the *Shell* case and is contrary to other controlling decisions in the Federal Court system.

POINT VII.

THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS COMMITTED REVERSIBLE ERROR BY SHIFTING THE BURDEN OF PROOF FROM THE SHOULDERS OF THE TRIBE TO THE SHOULDERS OF PROBST IN MAKING THE DETERMINATION OF WHETHER PROBST WOULD BE PREJUDICED BY HAVING HIS LAND TAKEN AWAY FROM HIM AFTER EIGHT YEARS.

Probst proved that the Tribe had knowledge of its so-called statutory right, let that right expire, and did not file its complaint until long after the analogous state Statute of Limitations governing fraud actions had run. It is our position that it should have been the burden of the Tribe to come forward with proof that its unconscionable delay had not prejudiced Probst. The Circuit Court, however, shifted the burden of proof from the shoulders of the Tribe to the shoulders of Probst with the following statement:

> "In any event, Probst has shown no prejudice resulting from the delay. He has been in

> possession of the land since 1959 and has enjoyed the benefits of its use. In our opinion laches is no bar to the claim of the Tribe.

The following cases support our position that the Circuit Court erred in its determination of who had the burden of proof on the issue of prejudice.

In *Kelley et al v. Boettcher, et al.*, 85 F. 55, 62 (8th Cir. 1898), the Court stated:

> "When a suit is brought within the time fixed by the analogous statute, the burden is on the defendant to show, either from the face of the bill or by his answer, that extraordinary circumstances exist which require the application of the doctrine of laches; and, when such a suit is brought after the statutory time has elapsed, the burden is on the complainant to show, by suitable averments in his bill, that it would be inequitable to apply it to his case."

See also *Backus-Brooks Co. v. Northern Pac. Ry. Co., et al.*, 21 F.2d 4, 12 (8th Cir. 1927), Cert. den. 275 U.S. 562, 48 S.Ct. 120, 72 L.Ed 427 (1927); *Citizens Savings & Trust Co. v. Belleville & S.I.R. Co.*, 157 F.73 (7th Cir. 1907); and *Larios v. Victory Carriers, Inc.*, supra.

Until its decision in the case at bar, the Tenth Circuit Court was clearly in line with the general rule of law as pronounced by the foregoing authorities. See *Shell v. Strong*, supra, where the Court stated:

> "When a suit is brought within the time fixed by the analogous statute, the burden is on the defendant to show, either from the face of the complaint or by his answer, that extraordinary circumstances exist which require the application of the doctrine of laches. *On the other hand,*

when the suit is brought after the statutory time has elapsed, the burden is on the complainant to aver and prove circumstances making it inequitable to apply laches to his case."

We believe this Honorable Court should grant our Petition in order to reaffirm the rule of law pronounced in the cases cited herein, so that opposite rules in different circuits can be avoided, and particularly so that the Tenth Circuit Court may be prevented from moving away from its own rule as pronounced in the *Shell* case, supra.

POINT VIII.

THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS COMMITTED REVERSIBLE ERROR BY DEPRIVING PROBST OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW CONTRARY TO THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

At the time of trial, the *Shell* case, supra, was the law of the Tenth Circuit. Under *Shell* if Probst could establish as a defense that the State Statute of Limitations had run, the burden of proof would shift to the Tribe to show that Probst would not be prejudiced by being deprived of his land. Absent such proof, the Statute of Limitations and laches would be a defense and Probst would win. Now the Tenth Circuit Court has said "In any event, Probst has shown no prejudice resulting from the delay." This constitutes a clear reversal of the law as it had previously existed in the Tenth Circuit and upon which counsel for Probst were

entitled to rely at the time of trial. If counsel for Probst had known that they must prove that Probst was prejudiced by the failure of the Tribe to more timely file its action in order to take advantage of the defense of laches they might have tried the case in a different manner. For instance, they might have established that in 1964 the Strawberry land was marginal range land but that in 1967 proposed development of the Strawberry reservoir had changed the land to recreation land with a spectacular increase in its value. They might have established that loss of the land would require Probst to scrap expensive and time-consuming plans for future development of the land.

We submit that Parley Probst was denied a substantial property right without due process of law contrary to the Fifth Amendment to the Constitution when a different and more onerous burden of proof was placed on his shoulders by the Tenth Circuit Court at a time when it was too late for him to meet that burden.

POINT IX.

THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT HAS FASHIONED AN INEQUITABLE AND DISCRIMINATORY REMEDY THAT WOULD OPEN THE DOOR FOR A MULTITUDE OF INAPPROPRIATE LITIGATION, BY HOLDING THAT THE UTE TRIBE IS ENTITLED TO RECEIVE THE STRAWBERRY BAND UPON PAYMENT OF $35,000.00.

The Circuit Court has fashioned a remedy on behalf of the Tribe which was not provided for in the Termination Act. The justification given is that "When federally secured rights are involved, federal courts must adjust their remedies to grant appropriate relief." But in its effort to "adjust" the remedies in this case the Circuit Court has failed to consider the far-reaching and undesirable after-effects that will arise from such an adjustment.

For example, assuming the right of first refusal to exist on the Strawberry land, it clearly existed for each and every member of both the full-blood and the mixed-blood members of the Tribe. In addition, if the Tribe as an entity had such a right on behalf of the full-bloods, then by the same token, the Affiliated Utes had the same right on behalf of the mixed-bloods. There are more than 1800 members of the Ute Tribe. What is to prevent any number of them from coming in, now that their respective rights of first refusal have been recognized, and now that the Circuit Court has held that the Statute of Limitations and laches are no defense, and offering to meet the $35,000.00 figure? As a matter of fact, the Uintah-Ouray Indian Ageney records show that following the denial by the Circuit Court of the Petition for Rehearing in this case, the Affiliated Utes made a written tender of the $35,000.00 in compliance with the regulations of the Secretary (see Appendix No. X). And it now becomes clear that even if the Circuit Court's decision is sustained the Tribe may nevertheless fail in its attempt to obtain the Strawberry land. This is true because two qualified *members* of the Tribe have undertaken to exercise their

so-called rights of refusal, one by filing this lawsuit, and one by making a proper *tender* of the offering price. It would now appear necessary, in accordance with 25 C.F.R. 243.7, that both submit sealed bids, in order to determine which one gets the property.

We believe that such sealed bids may very well not be proper, however, until posting has taken place, in view of the fact that to allow the two entities to bid under a statute and regulations that required posting as a necessary first step in the exercising of the right of first refusal would be discriminatory and would defeat the purpose of the offering provision in Sec. 477n, which was to give an *equal* right of refusal to every individual full-blood and mixed-blood member of the Tribe.

We submit that there is no way to protect the right of first refusal on behalf of the members of the Tribe, assuming it to exist, other than to go all the way, including posting of offers, accepting of bids, etc. To do otherwise would be to invoke an unconscionable discrimination between equally entitled members of the Tribe.

Yet if a posting and bidding procedure is to be set up after all these years, impossible difficulties become readily apparent. Conditions have so changed that there is no way of recreating the situation existing on and prior to August 27, 1964. Many members have died. Some have estates in various stages of probate. Heirs have dispersed. Then, too, the value of the land has changed dramatically. The Circuit Court itself recognized the difficulty involved where it stated: "It

is impossible to reconstruct what would have occurred if Elizabeth had made the required offering. In addition, the ten-year period fixed by the statute has passed."

And we keep coming back to the very fundamental proposition that the Tribe is responsible for the impossibility of recreating conditions as they existed on and before August 27, 1964. Curry's deliberate non-action for over three years after the termination date takes care of that matter completely. In addition, Curry's non-action points up the stubborn fact that on and before August 27, 1964 the Tribe was not interested in paying $9,000.00 more than the Government appraisal for the Strawberry land. The Circuit Court stated:

> "To do equity a decree should put the parties in the position where they would have been if the required offer had been made."

We wish this could be done because we are confident that thusly positioned the Tribe would repeat its then position and would do exactly nothing.

What this matter really gets down to is that the Trial Court was correct when it stated in its Conclusion of Law No. 11, "In the case at bar the plaintiff tribe suggests injury by being deprived of the opportunity of acquiring the property for $35,000.00. It is speculative because of the impossibility of reconstructing what would have happened should the property have been posted that the tribe would have acquired the property at all and certainly it is speculative that it would have acquired it for $35,000.00."

We submit that our Petition should be granted, in order to review the substantial errors into which the Circuit Court has fallen. If, as we contend, the Tribe did *not* acquire a statutory right of first refusal, then a declaration to that effect would avoid the innumerable legal complications to which we have herein alluded.

CONCLUSION

We respectfully submit that there are strong and compelling reasons why this Honorable Court should grant our Petition for a Writ of Certiorari.

The Ute Termination Act was passed into law on August 27, 1954. It established a ten-year transitional period during which the mixed-blood members of the Tribe could gradually develop the independence and self-reliance necessary so that they could achieve full citizenship. The provisions of the Act are complicated and interrelated. Legal interpretations affect not only the litigants here but all of the more than 1800 members of the Tribe and all non-members who entered transactions with members during the transitional period. In the case at bar, the Tenth Circuit Court has held that Sec. 677n applied to the Strawberry land even though Elizabeth's outright purchase of the land had removed it from the category of being a tribal asset before the Probst agreement ever came into existence; and by so doing it has opened the door for the Tribe to now acquire every single parcel of marginal mixed-blood land, sold pursuant to Sec. 677(L)(5) during the transitional period without a posting and

bidding, by simply offering to meet the original sale price. It has interpreted 25 U.S.C. 677n in a way highly inconsistent with the fundamental purpose of the Termination Act and in a way highly inconsistent with the language of the Act. It has held that Sec. 677n did not terminate Federal supervision over mixed-blood land on August 27, 1964 even though the clear intent of Congress was to terminate all Federal restrictions by said date. In so holding it has even come into conflict with itself in the *Reyos* case. It has held that the Tribe could assert its so-called right of first refusal for the first time more than three years after the termination date even though it is abundantly clear that the Tribe with full knowledge of the Probst agreement had waived and abandoned any claimed right of first refusal by its own deliberate non-action.

It has held that the Utah Statute of Limitations and laches are not defenses against the Tribe and has thus placed the Tenth Circuit Court at odds with United States Supreme Court and other Circuit Court decisions, and it has denied Probst his property without due process of law by not allowing him to meet a newly created burden of proof that did not exist at the time of trial.

Furthermore, its holding has already led to a contest between equally entitled entities of the Tribe, which indicates the impossibility of sustaining the Circuit Court's ruling without invoking an inequitable and probably unconstitutional discrimination against the individual members of the Tribe as well as against the Affiliated Ute Corporation. The impossibility of recre-

ating conditions that existed back on August 27, 1964 and the fact that the Tribe's knowledgeable inaction brought about that impossibility are apparent.

There is only one way injustice and legal confusion can be prevented here and that is for this Honorable Court to grant our Petition, to declare that the Tribe has no interest in the Strawberry land, and to return the case to the Circuit Court for a determination of the unresolved issues between Parley Probst and Elizabeth's estate.

Respectfully submitted,

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